IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES EISELE,	)	
	)	DIVISION ONE
Respondent,	)	
	)	No. 61663-3-I
v.	)	
	)	UNPUBLISHED OPINION
KATE BOND,	)	
	)	
Appellant.	)	FILED: July 13, 2009
_____	)	

Dwyer, A.C.J. — Formation of a contract requires that the contracting parties mutually assent to the terms of the agreement. James Eisele's and Kate Bond's correspondence, as well as their partial performance of Bond's proposed terms for the division of their jointly owned property, establish that they reached an agreement concerning the division of their property to settle their affairs. The record does not show that their agreement was conditioned on the valuation of their personal property. Accordingly, we affirm the trial court's order granting summary judgment on the issue of contract formation and its order for Bond to pay Eisele pursuant to the terms of the agreement.

I

Between 1995 and 2003, James Eisele and Kate Bond purchased, renovated, and either sold or rented several houses together. During this time, Eisele and Bond lived together in a monogamous relationship and shared joint bank accounts. Eisele and Bond jointly owned each of the houses they purchased. Bond contributed the vast majority of capital and some labor. Eisele contributed most of the labor and a small amount of capital. In 2003, the couple ended their romantic relationship. Bond moved out of their house, leaving various items of personal property in Eisele's possession.

At the center of this dispute is a proposal for the division of jointly owned property that Bond prepared in October 2004. According to the terms of Bond's proposal, each party would take exclusive title to two of the four houses that they jointly owned at that point. By Bond's calculations, this division of real estate would result in a net gain to her of $28,205 in home equity. The proposal did not specify, however, terms for the division of personal property. Instead, it left for later the valuation of personal property, while specifying that Bond's real estate debt would be offset by the division of personal property. Bond's written proposal stated: "Kate owes Jim [$]28,205 . . . minus agreed on possessions difference." The intent of the proposal—that each of the parties receive 50 percent of their shared property—is apparent from the offset provisions.

The parties dispute whether they mutually agreed to the terms of Bond's

proposal. Neither party signed the proposal. Bond confirmed in her deposition that she drafted the proposal and that the parties discussed it. She does not deny that she agreed to these terms. She testified that she desired to cut all ties with Eisele. Eisele contends that he orally agreed to these terms. Bond asserts that he did not.

During the next year and a half, Bond and Eisele repeatedly referred to the terms of Bond's October 2004 proposal in multiple emails sent to one another. The emails and a timeline of events reconstructed by Bond indicate that she retained a lawyer to draft a formal settlement agreement in late 2004.[1] In February 2005, Bond sent an email to both Eisele and her attorney, in which she acknowledged that she would owe Eisele money pursuant to the terms of the agreement. Further, she stated that she hoped to be able to pay Eisele by late spring or early summer. She also stated that her lawyer would draft a written agreement by mid–February. Bond's lawyer did not, however, prepare a written agreement. In late May 2005, Bond acknowledged that she had "really let everything slide" and reassured Eisele that she would have a written agreement prepared by June. She also stated, "I'll be able to pay you the 20–30 grand that I will owe you next month as well." But Bond did neither.

In August 2005, the parties performed the core terms of the agreement, by executing quitclaim deeds on the four houses pursuant to the terms of the

[1] Also, in either late 2004 or early 2005, Bond agreed to co-sign an application with Eisele for a new equity line of credit on one of the houses to which Eisele was supposed to take sole title under their agreement. In addition, she agreed to share the cost of bringing into compliance with the building code one of the houses that Eisele would take.

October 2004 proposal. The record does not disclose why the parties waited roughly 10 months to divide these assets.

After executing the quitclaim deeds, the parties continued to email each other concerning Bond's resulting debt. In August 2005, Bond wrote Eisele a check for $5,000. Eisele did not cash this check immediately, however, because, in his view, it was inconsistent with the terms of their agreement. Bond responded that she had not intended this check to be a final settlement payment but instead intended it to provide Eisele with temporary financial assistance. She explained that she was still waiting for her lawyer to draft a written document and raised the possibility of entering mediation if her lawyer did not "come through." She further stated that she expected to be able to pay Eisele by December 2005. Bond then placed a stop-payment order on the check because she did not have sufficient funds in her account to honor it. In response to Bond's emails, Eisele expressed his frustration at the length of time it was taking to finalize their settlement and his desire to do so soon.

Later that fall, Bond and Eisele began to more actively discuss the valuation and division of their personal property, which consisted of two automobiles, furniture, tools, clothing, and other items. Bond indicated that she wished for Eisele to take sole title to the vehicles. She again raised the possibility of their entering mediation and for the first time stated that she had never intended to financially settle with Eisele without the participation of her

attorney or a mediator.

In November, just before her 40th birthday, Bond sought to regain possession of clothing that was stored in Eisele's garage. Bond claims that Eisele was withholding her clothing and that he would release it only if Bond paid him $15,000. Eisele contends that Bond was free at any time to take whatever personal property she wanted and that, at that time, he asked her to pay him $10,000 in satisfaction of her debt from the division of real estate. Bond later wrote Eisele another $5,000 check, which Eisele cashed.

In the spring of 2006, after an apparent lull in communication, Eisele emailed Bond multiple times, reminding her about her debt and inquiring as to which items of personal property she desired to collect. Bond responded in late May with a list of items that she wanted. She also calculated the amount of money she thought she owed Eisele pursuant to the terms of the October 2004 proposal. Starting with the baseline figure of $28,205 that she had initially calculated in 2004, Bond deducted the $5,000 that she had paid him the previous November and the value of the personal property that Eisele would retain. She then calculated that she owed Eisele $6,228.[2]

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[2] Bond stated in her email:

> As for the money, here's what I have:
> 28,205 Owed to make it even based on the house values
> -5,000 Given to you in November
> -11,977 which is ½ of my margin debt as of when we split up
> -5,000 for the cars and tools and mangkorns and art and furniture, etc.
> =6,228.
>
> Clerk's Papers at 194.

In late June 2006, Bond presented Eisele with the long-awaited written agreement. But in it, she offered to pay Eisele only $1,000. Eisele rejected Bond's new offer.

In August 2006, Eisele brought a complaint for breach of contract against Bond. He alleged that they had reached an agreement to settle all of their affairs with one another according to the terms of the October 2004 proposal and that Bond owed him compensatory damages in the amount of $23,205 (Bond's original debt of $28,205 less the $5,000 that she had paid) plus interest. He also deposited Bond's personal property, including the items that she had specified in her May email, in a storage unit. Bond later took possession of these items. Bond then filed an answer and counterclaim, in which she sought to recover a substantial portion of her capital investment on the theory that she and Eisele had been in a committed intimate relationship. More than a year later, in February 2008, Bond filed an amended counterclaim adding an alternative claim for an accounting and distribution of partnership assets.

The parties then filed cross-motions for summary judgment. After the trial court heard oral argument on the parties' motions, it found that they had entered into and partially performed an enforceable agreement, as evidenced by the exchange of deeds and Bond's payment of $5,000 to Eisele. The trial court then ordered the parties to account for the value of the personal property. Bond estimated the value of the personal property to be $22,224, while Eisele

estimated its value to be $3,165. In determining the value of the personal property, the trial court accepted Bond's total valuation, resulting in an allocation of $11,112 to each party. As the parties had not accounted for depreciation, the trial court applied a discount rate of 50 percent and valued each party's share at $5,556. Subtracting this amount from $23,205 (the $28,205 baseline figure minus the $5,000 that Bond paid Eisele in November 2005), the trial court found that Bond owed Eisele a total of $17,649 and ordered her to pay him this amount.

In so ruling, the trial court denied Eisele's claim for future contribution to any code-compliance construction because he had introduced no evidence on that matter. The trial court expressly ruled that Bond could not be held liable for such expenses in the future. Further, it made no ruling on whether the parties were in a meretricious relationship or operated as a partnership. The trial court further concluded that their agreement resolved all of the parties' financial dealings and dismissed Bond's claims for recovery under community property and partnership theories.

II

Bond first contends that summary judgment was improper because genuine issues of material fact exist concerning whether Eisele and she mutually assented to the terms of her October 2004 proposal. We disagree.

Summary judgment is appropriate if there is no genuine issue of material

fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We engage "in the same inquiry as the trial court, construing the facts and reasonable inferences therefrom in the manner most favorable to the nonmoving party to ascertain whether there is a genuine issue of material fact." Sellsted v. Wash. Mut. Sav. Bank, 69 Wn. App. 852, 857, 851 P.2d 716 (1993), overruled on other grounds by Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 898 P.2d 284 (1995). "[B]are assertions that a genuine material issue exists will not defeat a summary judgment motion in the absence of actual evidence." Trimble v. Wash. State Univ., 140 Wn.2d 88, 93, 993 P.2d 259 (2000) (citing White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997)). As the United States Supreme Court recently explained, in applying the identical standard under Federal Rule of Civil Procedure 56(c), "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).

For a contract[3] to exist, the parties must mutually assent to the essential terms of the agreement. McEachern v. Sherwood & Roberts, Inc., 36 Wn. App. 576, 579, 675 P.2d 1266 (1984) (citing Peoples Mortg. Co. v. Vista View

[3] The parties refer to Bond's October 2004 proposal for the division of property as a "settlement agreement" and cite cases analyzing CR 2A settlement agreements. It is inaccurate, however, to refer to the parties' agreement as a CR 2A settlement agreement because the parties had not yet entered litigation when they purportedly reached their agreement. We analyze the issue pursuant to applicable contract principles.

Builders, 6 Wn. App. 744, 496 P.2d 354 (1972)). "Mutual assent generally takes the form of an offer and an acceptance." Pacific Cascade Corp. v. Nimmer, 25 Wn. App. 552, 556, 608 P.2d 266 (1980). The burden of proving the existence of a contract is on the party asserting its existence, and that party must prove the existence of mutual assent. Cahn v. Foster & Marshall, Inc., 33 Wn. App. 838, 840, 658 P.2d 42 (1983).

The evidence in the record leads to the conclusion that the parties agreed to the terms of Bond's October 2004 proposal for the division of property. There is no dispute that Bond offered these terms and drafted the proposal that specified she would owe Eisele $28,205 after they divided their real estate and, further, that this figure would be offset according to valuation of their shared personal property. Bond repeatedly referred to these terms and to this debt figure in her emails to Eisele over the ensuing 18-month period. After the parties executed the quitclaim deeds, Bond acknowledged her debt to Eisele consistent with the terms of her October 2004 proposal. Of great significance is Bond's recognition in May 2006—long after the parties' discussion in October 2004 and other real estate transactions in the winter of 2004 and 2005—that she owed Eisele a base sum of $28,205, minus offsets for personal property and the payment that she had already made. Even when viewed in a light most favorable to Bond, her own email correspondence establishes that she remained committed to the terms of her October 2004 proposal throughout the relevant

time period.

The evidence also supports Eisele's contention that he agreed to the terms of the October 2004 proposal. Statements in Eisele's emails from the spring of 2005 reveal that he was waiting for Bond to draft a written agreement and to secure the money that she would owe him once they exchanged deeds. Further, in the fall of 2005, after the exchange of deeds, Eisele repeatedly referred to the parties' agreement that they had reached the previous year. The record indicates that Eisele consistently sought to be paid under the terms of the October 2004 proposal throughout the relevant time period, a course of action consistent with his having assented to the terms for the division of property that Bond had proposed. Bond introduced no evidence to refute this inference; she merely asserted that Eisele did not accept her proposal. Bond's version of events lacks evidentiary support. More than bare assertions of ultimate facts are required to resist a motion for summary judgment that is well supported by the evidence presented.

In addition, there is no merit to Bond's argument that the parties' agreement concerning the disposition of the real property violated the statute of frauds. When parties partially perform part of an oral contract that unmistakably points to the existence of an agreement, the statute of frauds is satisfied. Friedl v. Benson, 25 Wn. App. 381, 389–90, 609 P.2d 449 (1980) (quoting Miller v. McCamish, 78 Wn.2d 821, 828–29, 479 P.2d 919 (1971)). Because the parties

executed quitclaim deeds, they satisfied the statute of frauds.

Further, that the parties waited for 10 months after their initial agreement to execute quitclaim deeds is of no consequence on the issue of mutual assent. This delay does not indicate that Eisele failed to assent to the proposal. On the contrary, the exchange of deeds fulfilled the key term of the proposal. Further, Bond's subsequent recognition of the terms that she proposed in October 2004 establishes that she had not withdrawn her assent in the intervening months.

Although the parties never signed a written agreement memorializing the terms of the October 2004 proposal, the record establishes that they consistently relied on these terms to divide their jointly owned real estate assets. Even when the record is viewed in the light most favorable to Bond, there is nothing to refute the inference that Eisele accepted Bond's proposal for the division of property. Accordingly, we conclude, as the trial court did below, that the parties mutually assented to the terms of the October 2004 proposal.

III

Bond also contends that the valuation of the parties' personal property was a condition of any agreement concerning the division of their shared property. She argues that the parties' failure to agree to the value of the personal property left an essential term uncertain, thereby rendering her proposal unenforceable. Again, we disagree.

Conditions precedent[4] are "those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, [and] before the usual judicial remedies are available." Ross v. Harding, 64 Wn.2d 231, 236, 391 P.2d 526 (1964) (citing 3A Corbin, Contracts § 628, p.16; Partlow v. Mathews, 43 Wn.2d 398, 261 P.2d 394 (1953)). In contrast, "[a] promise is a manifestation of an intention to act . . . in a specified way, so made as to justify the promisee in understanding that a commitment has been made." 13 Richard A. Lord, Williston on Contracts § 38:5, at 382 (4th ed. 2000) [hereinafter Williston]. "Breach of a promise . . . subjects the promisor to liability

[4] At oral argument, counsel for Bond argued that the valuation and division of personal property was a "condition precedent" to the division of real estate as opposed to a "condition subsequent." The latter term is inaccurate in this context. The Restatement (Second) of Contracts explains that a "condition subsequent" is "subject to the rules on discharge" and describes it as follows: "Parties sometimes provide that the occurrence of an event, such as the failure of one of them to commence an action within a prescribed time, will extinguish a duty after performance has come due, along with any claim for breach." Restatement (Second) Contracts § 224 cmt. e (1981). The issue here is not whether the parties' delay in valuing and dividing personal property discharged Bond's duty to compensate Eisele for her gain resulting from the division of real estate. Instead, the issue is whether her duty to do so was conditioned on the valuation of personal property. Accordingly, we use the terms "condition" and "promise," as other courts and commentators have.

in damages, but does not necessarily excuse performance on the other side." 13 Williston, *supra* § 38:5, at 382–83; see also Ross, 64 Wn.2d at 236; Jones Assocs., Inc. v. Eastside Props., Inc., 41 Wn. App. 462, 467, 704 P.2d 681 (1985). "Whether a provision in a contract is a condition, the nonfulfillment of which excuses performance, depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances." Ross, 64 Wn.2d at 236 (citing 5 Williston, Contracts (3d ed.) § 663, p. 127). "'An intent to create a condition is often revealed by such phrases and words as 'provided that,' 'on condition,' 'when,' 'so that,' 'while,' 'as soon as,' and 'after.'" Vogt v. Hovander, 27 Wn. App. 168, 178, 616 P.2d 660 (1979). But when "it is doubtful whether words create a 'promise' or an 'express condition,' they are interpreted as creating a 'promise.'" Ross, 64 Wn.2d 236 (citing Restatement, Contracts § 261, p. 375; 5 Williston (3d ed.) § 665 p. 133).

Bond's contention that any agreement about the division of the parties' shared property was conditioned on the completed valuation of their personal property lacks merit. The informal October 2004 proposal indicates that the parties intended to offset Bond's debt to Eisele resulting from the division of real estate by the value of personal property. But it does not indicate that the valuation and division of their personal property was a condition of their agreement as to the valuation and division of their real estate. Although the

parties discussed in their emails the need to divide their personal property, their correspondence does not indicate that their agreement was contingent on the valuation of their personal property. On the contrary, they exchanged quitclaim deeds—by which Bond incurred her debt to Eisele—without having valued the personal property. And as late as 18 months after she proposed the terms of division, Bond referred to $28,205 as being the baseline amount that she owed Eisele as a result of their division of the real property. A fair reading of the terms of Bond's October 2004 proposal, coupled with a fair consideration of the parties' behavior, leads to the conclusion that the parties promised to value the personal property as part of their overall agreement but that their doing so was not a condition for the division of property.

Similarly, there is no merit to Bond's argument that the October 2004 proposal was somehow incomplete or an unenforceable agreement to agree. See Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 175–76, 94 P.3d 945 (2004) (quoting Sandeman v. Sayres, 50 Wn.2d 539, 541–42, 314 P.2d 428 (1957)). Again, to form a contract, the parties must agree to *essential terms*. McEachern, 36 Wn. App. at 579. Whether an agreement is so indefinite as to be unenforceable depends on whether a court can "decide just what it means, and fix exactly the legal liability of the parties." Sandeman, 50 Wn.2d at 541. "The defense of uncertainty in the terms of a contract is not applicable in an action based upon the contract when performance has made it certain in every

respect in which it might have been regarded as uncertain." Platts v. Arney, 46 Wn.2d 122, 126, 278 P.2d 657 (1955) (citing McDougall v. McDonald, 86 Wash. 334, 337, 150 P. 628 (1915); Christoferson v. Radovich, 23 Wn.2d 846, 849, 162 P.2d 830 (1945)). The valuation of personal property cannot be considered essential, as the parties manifested their intent to divide their property equally, specified the amount of Bond's initial debt, and eventually divided their real estate. This situation is akin to those cases in which courts have held that contracts containing imprecise terms of cost performance or value of property to be divided are nonetheless valid. See, e.g., Purvis v. United States *ex rel* Associated Sand & Gravel Co., 344 F.2d 867, 869–70 (9th Cir. 1965); In re Marriage of Hawkins, 160 Ill. App. 3d 71, 75, 513 N.E.2d 143 (1987); Janzen v. Phillips, 73 Wn.2d 174, 177–78, 437 P.2d 189 (1968); see also Restatement (Second) Contracts §§ 33, 34 (1981); I Williston § 4:29, at 859–64; Corbin on Contracts (1993 ed.) § 2.8, at 136–42. The parties' failure to value their personal property does not mean that they failed to reach an agreement.[5]

IV

Finally, Bond contends that a jury should have determined the value of the parties' personal property. She is incorrect.

As both parties essentially sought an accounting of comingled assets, the

[5] The arguments that the parties make concerning whether the law of meretricious relationships or partnerships applies are irrelevant as the parties' agreement resolves their dealings with one another.

Further, because we affirm the trial courts' grant of summary judgment, we need not review the trial court's order striking Bond's expert witness. The witness's proffered testimony was unrelated to the issues of contract formation and conditions for performance.

trial court's valuation of the parties' personal property is properly viewed as an exercise of its equitable power. See Auburn Mechanical, Inc. v. Lydig Constr., Inc., 89 Wn. App. 893, 899, 951 P.2d 311 (1998) (explaining that courts must look to the nature of the action, not its form, to determine whether a claim is legal or equitable). There is no right to a jury trial in an action in equity. Knudsen v. Patton, 26 Wn. App. 134, 137, 611 P.2d 1354 (1980) (citing Dexter Horton Bldg. Co. v. King County, 10 Wn.2d 186, 116 P.2d 507 (1941)). We review the trial court's valuation of property for abuse of discretion and will not disturb a trial court's decision so long as the valuation is within the scope of the evidence. In re Marriage of Gillespie, 89 Wn. App. 390, 403, 948 P.2d 1338 (1997).

The court's valuation was within the range of the evidence. The parties agreed that Bond would owe Eisele $28,205 after they executed the quitclaim deeds. This figure served as the baseline for the trial court's calculation of Bond's obligation. Bond paid Eisele $5,000 in November 2005, thus reducing the amount of her obligation to $23,205. Bond estimated the value of the personal property at $22,224; Eisele estimated it at $3,165. After accepting Bond's calculation and applying a discount rate of 50 percent, the trial court valued the personal property at $11,112. Allocating half of that amount to each party, the trial court deducted $5,556 from Bond's obligation of $23,205 and found that Bond owed Eisele $17,649. Bond's various arguments that the trial court erred in its valuation lack merit. She neither explains why the trial court's

discount rate is incorrect nor offered an alternative method in the trial court. Bond points to nothing to refute the trial court's finding that her payment of a joint debt of $23,815 did not satisfy her debt arising out of the division of real estate because she made this payment before the parties reached their agreement. Finally, in arguing that the trial court failed to account for any liability that she might incur from her promise to share the cost of future construction on one of Eisele's houses, she ignores the trial court's express ruling that she cannot be held liable in this regard. The trial court's valuation decisions and calculation of Bond's debt were within the scope of the evidence. The trial court did not abuse its discretion.

Affirmed.

Dwyer, A.C.J.

We concur:

Edmonds, J.

Grosse, J.